Filed 8/23/19 1100 Wilshire Prop. Owners Assn. v. Wilshire Commercial, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

1100 WILSHIRE PROPERTY OWNERS ASSOCIATION, Plaintiff, Cross-defendant and Appellant, v. WILSHIRE COMMERCIAL, LLC, Defendant, Cross-complainant and Respondent.	B285336 (Los Angeles County Super. Ct. No. BC564800)

APPEAL from an order of the Superior Court of Los Angeles County, Louis M. Meisinger, Referee. Affirmed.

Law Offices of Jeffrey M. Cohon and Jeffrey M. Cohon for Plaintiff, Cross-defendant and Appellant.

Winston & Strawn, Saul S. Roastamian and Diana Hughes Leiden, for Defendant, Cross-complainant and Respondent.

A court-appointed referee sanctioned plaintiff and appellant 1100 Wilshire Property Owners Association (the Association) $31,065 for taking a frivolous legal position in connection with its board of directors election—a position inconsistent with the referee's own previously expressed interpretation of the Association's election rules. We consider whether the sanctions order should be reversed because the position the Association advocated was a good faith interpretation of the election rules, or, as the Association now contends, because it was deprived of an opportunity to withdraw the brief asserting the frivolous position before sanctions were imposed.

I

A

The development at 1100 Wilshire Boulevard (the Building) is a mixed-use building comprised of 228 residential condominium units and commercial space. The residential condominium unit owners and defendant and respondent Wilshire Commercial, LLC (Wilshire Commercial),[1] the entity that is the current owner of the two commercial "lots" in the development (including the Building's commercial garage), are all members of the Association and part owners of the building.

An Amended and Restated Declaration of Covenants, Conditions and Restrictions and Reservation of Easements (the CC&Rs) governs the Building. The CC&Rs locate power to

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[1] 1100 Wilshire Commercial, LLC, and 1100 Wilshire Garage, LLC, are the successors to what used to be known as Wilshire Commercial, LLC.

manage the Building in the Association's five-member Board of Directors (the Board), except for certain actions that require approval of a majority of the members of the Association. The Board acts under the authority of the Association's bylaws.

B

1

A dispute eventually arose between the Association and Wilshire Commercial regarding the procedures specified in the CC&Rs and Association bylaws for electing directors to the Board.

Section 3.3.1 of the CC&Rs states residential owners "shall be entitled to one (1) vote for each Residential Condominium owned by such Residential Owner." As for commercial owners, section 3.3.1 states the owner of each of the Building's two commercial "lots" is entitled to 10 votes (i.e., 20 votes total for the commercial owners).

The CC&Rs provide a further concession to the Building's commercial owners regarding representation on the Board. Section 3.3.4 of the CC&Rs states as follows in pertinent part: "To assure the Commercial Owners' representation on the Board, at least one (1) of the directors on the Board shall be elected solely by the vote of the Commercial Owners (the 'Commercial Director'). In selecting such Commercial Director each Commercial Owner shall be entitled to the number of votes allocated to the Commercial Lot(s) owned by such Commercial Owner in Section 3.3.1 . . . and the Person receiving the greatest number of votes shall assume such Commercial Director position."

The Association bylaws incorporate the substance of the above-quoted CC&R voting provisions. But the bylaws also include a provision regarding "Cumulative Voting," section 2.7. Section 2.7 states in relevant part as follows: "In any election of the Board in which two (2) or more positions are to be filled, every Owner entitled to vote at such an election shall have the right to cumulate his votes and give one candidate, or divide among any number of candidates, a number of votes equal to the number of Directors to be elected to such Committee multiplied by the number of votes which such Owner is otherwise entitled to cast pursuant to the [CC&Rs] and these Bylaws . . . ."

2

The Association sued Wilshire Commercial, and Wilshire Commercial responded by filing a cross-complaint against the Association and several individual defendants.[2] One of the claims apparently raised in Wilshire Commercial's cross-complaint was that the Board impermissibly adopted rules permitting Wilshire Commercial (as the owner of both of the Building's commercial lots) to vote only for the Commercial Director seat on the Board, rather than being permitted to vote for any of the other four seats. The lawsuits were assigned to retired judge Louis Meisinger (Referee) to decide as referee, and the parties briefed the issues concerning voting for resolution.

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[2] The attorney for the Association did not include Wilshire Commercial's cross-complaint in the appellate record. The date of the cross-complaint's filing is taken from other pleadings in the case.

At a hearing in March 2017, the Referee ruled the CC&Rs and Association bylaws permitted the Building's commercial owners to vote not just for the Commercial Director seat but for the other four seats on the Board. Counsel for the Association summarized his understanding of the Referee's ruling, stating: "It contemplates . . . once Wilshire Commercial exercises its votes in connection with its commercial director, whatever the remaining votes are can be cast on a cumulative basis for the rest of the residential directors." The Referee responded, "Right." The Association's attorney sought further clarification of how that would work in practice, and the Referee stated if Wilshire Commercial used their 20 votes to vote for the Commercial Director "they've got 80 left to be spread around the remaining seats under cumulative voting rules."

The written ruling the Referee prepared in connection with the hearing similarly relied on the Association bylaws' cumulative voting provision to support its conclusion that Wilshire Commercial was not restricted to voting only for the Commercial Director seat. The Referee concluded the commercial owners did not need cumulative voting to elect their guaranteed Commercial Director; rather, he reasoned, "[c]umulative voting could only become relevant if the Commercial Owners are casting votes for other [B]oard candidates."[3]

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[3] In the "Disposition" section of the written ruling, the Referee states he "grant[s Wilshire Commercial's] request for an order that only the Commercial Owner(s) may cast votes for the Commercial Director seat on the . . . Board, which will be assigned to the highest vote getter from the Commercial Owner(s)' 20 votes . . . ." The Referee further states in this section that he "grant[s Wilshire Commercial's] request for an

Later, in preparation for a general election of the Board to take place in May 2017, the Association designed a ballot for use by the owner(s) of commercial lots, i.e., Wilshire Commercial. The ballot stated: "'The Commercial Lots have a total of 10 votes for each lot, which must be cast as a unit. Each commercial lot may choose to cast its 10 assigned votes for either a Commercial Director **OR** Residential Directors, but not both. Should the votes assigned to a single Commercial Lot be cast for both the commercial **AND** residential seats, the ballot will be illegal and will not be counted. If both Commercial Lots elect to cast all of their votes for Residential Directors, the ballot will be considered legal, but a Commercial Director will not be elected.'"[4] The ballot as designed by the Association further stated "'[t]here is no cumulative voting for the Commercial Director, however[,] cumulative voting is permitted for the Residential Directors.'"

The parties were before the Referee on another issue the day after Wilshire Commercial received the ballots designed for use in the upcoming general election. Counsel for Wilshire Commercial expressed concern, based on the ballot it received, that the Association would disregard the Referee's prior voting

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order that Commercial Owner(s) is permitted to vote for the 4 other [Association] Director seats on the . . . Board."

[4] Counsel for the Association excluded from the appellate record the actual ballot prepared by the Association (attached as an exhibit to a Motion for Orders Re General Election filed by Wilshire Commercial). Our reproduction of the ballot language is taken from a quotation included in a written ruling later issued by the Referee.

ruling at the upcoming general election by not allowing "the commercial owner to cross-vote with the cumulative votes that were discussed—80/20, right? 20 votes for the commercial director; 80 votes for the other four seats." Counsel for Wilshire Commercial emphasized the Association's attorney "said it at the last hearing on the voting—to say, just to confirm, 20/80" and sought a representation on the record that this voting procedure would be followed at the upcoming election. The Association's attorney complained he was being "sandbagged" by the discussion of the issue at a hearing on another topic, and counsel for Wilshire Commercial agreed to postpone discussion on the topic until it filed a motion (on short notice). The Referee set the matter for hearing on an expedited basis and warned the parties that "if an election takes place in violation of an order that I made, that's the wrong judge to do that to."

The "Motion Re General Election" subsequently filed by Wilshire Commercial on May 2, 2017, (after a meet and confer process) argued the commercial lot ballots designed by the Association violated the Referee's prior ruling and the cumulative voting provision of the Association bylaws because it prohibited the commercial owner(s) (i.e., Wilshire Commercial) from voting for the other four Board seats in addition to the Commercial Director seat. The Association's opposition to the motion, filed just over a week later, conceded the Referee had previously found that "only commercial owners could vote for the commercial director, and that the commercial owners could (after first voting for the commercial director) cast its remaining votes for candidates nominated for residential directorships." But the opposition nonetheless argued it was not "remotely the case," under the CC&Rs and Association bylaws, that Wilshire

Commercial could cast 20 votes for the Commercial Director seat and still retain 80 votes to spread across the candidates for the other four Board seats.

The Referee resolved the dispute at a hearing on May 22, 2017, after hearing argument from counsel. Characterizing as an "absurdity" the Association's position that each commercial lot owner must either vote for a Commercial Director or "cross-vote" for other Board seats—but not both, the Referee concluded the Association's position was inconsistent with its own election rules, the Referee's prior rulings on Association voting issues, the provisions of the Association bylaws, and a contrary position the Association had taken in an earlier case the Referee judicially noticed.

Specifically, as to his own prior rulings on voting issues, the Referee noted he had already "explicitly found that the Commercial Owner is permitted to vote for its own seat on the . . . Board **in addition to** the four other . . . Director seats on the Board" (citing his written ruling quoted *ante* at fn. 3). The Referee emphasized he had also "clearly confirmed" on the record at the prior hearing without objection "that if the Commercial Owner 'use[s] up their 20, they've got 80 left to be spread around the remaining seats under cumulative voting rules.'" (Emphasis omitted.) And as to the Association's election rules (proposed for use in 2014), the Referee cited Rule XIV, which provided, in relevant part, that "[t]he Commercial owner is entitled to cast ten (10) votes for each commercial lot for a total of twenty (20) lots [*sic*], one vote for each of five (5) director seats to be filled for a total of one hundred (100) votes cast in any combination."

The Referee ordered the Association to design a new ballot in compliance with his findings and further ordered the upcoming

Board election would take place under the Referee's supervision "with costs of the Referee, if any, to be borne by the [Association]."

4

After this hearing resolving issues with the general election ballot, Wilshire Commercial filed a motion on June 7, 2017, seeking sanctions against the Association and counsel for the Association personally for making frivolous "submissions to the [Referee] regarding voting entitlements and related conduct."[5] The motion argued a showing of subjective bad faith was unnecessary to merit sanctions and contended Wilshire Commercial suffered needless litigation delay and expense because the Association "has continually taken positions with respect to voting entitlements that (1) are completely unsupported by the relevant authority, (2) contradict its own previous positions, and (3) violate [the Referee's] Orders outright."[6] Wilshire Commercial asked the Referee to impose aggregate sanctions of $117,075.50 ($83,575.50 in attorney fees

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[5] In addition to contending the Association's opposition to Wilshire Commercial's Motion Re General Election was sanctionable as frivolous, Wilshire Commercial's sanctions motion also challenged positions advanced by the Association at two other hearings on voting-related issues. Sanctions were not imposed for the Association's conduct at these other two hearings.

[6] The sanctions motion repeatedly cited the Association's design of the general election ballot, which it contended "directly violated the [Referee's March 2017] Voting Ruling because it required the Commercial Owner to choose between voting for a Commercial Director and voting for the other 4 . . . Board seats."

and $33,500 in costs) against the Association and the Association's attorney personally. The sanctions request was accompanied by a declaration from counsel for Wilshire Commercial listing the attorney fees "incurred" for various tasks associated with litigating the voting issues.

The Association and its attorney opposed Wilshire Commercial's request for sanctions. The opposition's chief line of defense was its contention that the threshold for imposing sanctions was high (actions and tactics that are completely without merit, or for the sole purpose of harassing an opposing party) and unsatisfied by Wilshire Commercial's showing. As to the drafting of the general election ballot and the Association's defense of the ballot as drafted before the Referee, the opposition maintained sanctions were inappropriate because "[t]here were no cases or decisions" interpreting the CC&Rs and Association bylaws, and thus, the Association found itself in "uncharted territory," which left it free to advocate what it believed was a reasonable legal position. The Association also argued the amount of sanctions requested by Wilshire Commercial was unsubstantiated because Wilshire Commercial purportedly "failed to establish what attorney[ ] fees were 'incurred.'" The Association made no argument that the sanctions motion was procedurally improper because they had not been provided a statutory "safe harbor" period before the motion was filed.

The Referee granted Wilshire Commercial's request to impose sanctions, although not in the full amount sought. The Referee concluded the Association's arguments seeking to defend the ballot designed for Wilshire Commercial's use in the general election "were being advanced for an improper purpose" and "to essentially deprive [Wilshire Commercial] of its votes" in a

manner "incompatible with everything [the Referee] said in the [initial March 2017] voting order." The Referee further found that while the Association "may be correct that no cases directly on point interpreted the [CC&Rs' and Association bylaws'] clauses at issue in [Wilshire Commercial's] motions, . . . the relevant, dispositive point is that the Referee's [initial March 2017] Voting Ruling set forth specific guidelines for proceeding with the General Election, which were binding on the [Association], but circumvented." The Referee accordingly imposed sanctions in the total amount of $31,065, intended both to compensate for expended attorney time and to deter improper conduct. No portion of the award, however, was made payable by the Association's attorney personally after Wilshire Commercial agreed to waive imposition of personal sanctions to avoid the state bar reporting obligations that such a sanctions award might otherwise trigger.

II

We are unconvinced by all three of the Association's arguments for reversing the Referee's sanctions award.[7] The Association argues the position it took in advocating for the offending ballot was not entirely without merit, but the Referee did not abuse his discretion in concluding to the contrary under the circumstances—including the Referee's prior rulings in the case. The Association advances a procedural argument it did not

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[7] We disregard arguments insufficiently presented (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956) and made by the Association for the first time in reply (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10).

make before the Referee, i.e., that it was deprived of a statutory safe harbor period during which it could have withdrawn its opposition, but the argument is forfeited for failing to raise it below. And the Association argues there was insufficient evidence before the Referee as to attorney fees incurred by Wilshire Commercial in litigating the general election ballot issues (which partly figured in the Referee's calculation of sanctions to be imposed), but this argument is itself frivolous—the declaration from counsel accompanying Wilshire Commercial's sanctions motion specified the fees that had been incurred.

A

Code of Civil Procedure section 128.5, as it read at the time of the Referee's sanctions award, stated a trial court or arbitrator "may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Former Code Civ. Proc., § 128.5, subd. (a).) The statute and case law define "frivolous" actions or tactics as those that are "totally and completely without merit or for the sole purpose of harassing an opposing party." (Former Code Civ. Proc., § 128.5, subd. (b)(2); see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Our review of the Referee's conclusion that the Association's advocacy for its general election ballot (in opposing Wilshire Commercial's Motion Re General Election) was completely meritless is for abuse of discretion. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450; *Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893.)

The Referee did not abuse his discretion in imposing sanctions because the Association's defense of its general election ballot—which allowed Wilshire Commercial (as the owner of the commercial lots) to cast its assigned votes for "either a Commercial Director **OR** Residential Directors, but not both"—was frivolous. It was inconsistent with section 2.7 of the Association bylaws, which states "every Owner entitled to vote . . . shall have the right to cumulate his votes and give one candidate, or divide *among any number of candidates*, a number of votes equal to the number of Directors to be elected . . . multiplied by the number of votes which such Owner is otherwise entitled to cast . . . ." (Emphasis ours.) It ran contrary to the Association's own rules proposed in 2014 that stated "[t]he Commercial owner is entitled to cast ten (10) votes for each commercial lot for a total of twenty (20) lots [*sic*], *one vote for each of five (5) director seats to be filled for a total of one hundred (100) votes* cast in any combination." (Emphasis, again, ours.) It was inconsistent with the Association's own position taken in prior civil litigation, where the Association argued it was "'counter intuitive [*sic*] that the Association would grant the Commercial Owner(s) a total of 80 (cumulative) votes and then limit it to casting those votes for a single board member.'"[8] And, perhaps of greatest significance to the Referee, the Association's opposition to Wilshire Commercial's ballot challenge directly flouted his own earlier March 2017 ruling on voting issues—the import of which was unmistakably clear to counsel for the Association given the Referee's on-the-record confirmation of the

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[8] The Referee found this prior position collaterally estopped the Association from arguing the contrary in this case.

upshot of the ruling when the Association's attorney asked ("[I]f they use up their 20, they've got 80 left to be spread around the remaining seats under cumulative voting rules").

Against all this, the two arguments the Association makes on appeal fall flat. First, the Association claims it reasonably took the position it did because "the issue of cumulative voting was not one of the issues to be decided, and was neither briefed nor argued[,] in connection with [the initial March 2017 voting ruling]." Characterizing the issue as one "of cumulative voting," however, misses the point. The Association's opposition was frivolous not because there was a question of whether Wilshire Commercial could cumulate votes, but because the Association took the untenable position (given the Referee's prior ruling and its own prior contrary positions) that Wilshire Commercial could not vote for both the Commercial Director seat and other seats on the Board up for election. Second, the Association reprises its argument that its opposition to Wilshire Commercial's Motion Re General Election was reasonable because there was no binding legal precedent and the issue was therefore "uncharted territory." As the Referee explained when he rejected the argument, the Association's argument fails because "the relevant, dispositive point is that the Referee's Voting Ruling set forth specific guidelines for proceeding with the General Election, which were binding on the [Association], but circumvented."

The Referee did not abuse his discretion in concluding the Association's position was totally and completely without merit.

B

At the time of the Referee's sanctions ruling, issued on July 27, 2017, the only Court of Appeal authority addressing the issue

held Code of Civil Procedure section 128.5 did not incorporate a safe harbor requirement (akin to the requirement in Code of Civil Procedure section 128.7). (See generally *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1316 ["The moving party serves the sanctions motion on the offending party without filing it. The opposing party then has 21 days to withdraw or correct the improper pleading and avoid sanctions (the safe harbor waiting period). At the end of the waiting period, if the pleading is not withdrawn or appropriately corrected, the moving party may then file the motion"] (*San Diegans*); see also *id.* at pp. 1316-1317 ["We are not persuaded by [the plaintiff's] contention that a party seeking sanctions under section 128.5 must comply with the safe harbor waiting period in section 128.7, subdivision (c)(1)"].[9]) Just over a week later, however, the Legislature amended Code of Civil Procedure section 128.5 to expressly incorporate such a safe harbor period, and the amendment took effect immediately. (Stats. 2017, ch. 169, § 1.)

The Association could have argued before the Referee—but did not—that sanctions should be denied because Code of Civil Procedure section 128.5 required safe harbor notice. The absence of such an argument below forfeits the issue on appeal.[10] (*Richey*

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[9] In a decision months after the Referee's ruling, Division Seven of this court disagreed with *San Diegans* and held former Code of Civil Procedure section 128.5 did incorporate a safe harbor requirement. (*Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117, 126-127.)

[10] Justice Moor would disregard the failure to object below on safe harbor grounds and exercise his discretion to reach the issue

v. AutoNation, Inc. (2015) 60 Cal.4th 909, 920, fn. 3.) On the merits, the Association's opening brief argues only that it would be "unfair" to affirm the sanctions award "because the amendment was intended to clarify existing law and to apply to motions that were decided before the amendment." The argument fails because statutory changes operate only prospectively in the absence of a clearly expressed contrary intent. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936; see also *San Diegans*, *supra*, 247 Cal.App.4th at pp. 1315-1316.)

C

The Association's final argument is that the attorney declaration accompanying Wilshire Commercial's sanctions

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and reverse. He argues forfeiture should not apply because *San Diegans* "was the only case authority available to the Association at the time." That gets the analysis exactly backward. Neither Wilshire Commercial nor the Referee should be faulted for adhering to existing precedent. Counsel for the Association, on the other hand, can and should be faulted for failing to alert the Referee to his position (if it was his position at the time; we do not know) that *San Diegans* was wrongly decided and a safe-harbor period should be required. Such arguments to depart from precedent are routinely made, and made precisely for the reason why we hold forfeiture applies: to preserve an issue for appeal. We see no reason to stretch to reverse a sanctions order meant to redress knowing noncompliance with court orders, especially when, as a factual matter, counsel for the Association was undisputedly on notice of Wilshire Commercial's intent to move for sanctions more than 21 days before it filed its sanctions motion and yet proceeded headlong in maintaining a frivolous position.

motion included "no evidence of any amount incurred by Wilshire Commercial . . . ." (Emphasis deleted.) In particular, the Association contends there was "no evidence" of the amount Wilshire Commercial paid or became liable to pay for the attorney work.

We have reviewed the attorney declaration and the argument is frivolous. The declaration identifies the standard hourly rates of Wilshire Commercial's attorneys and the amounts of time spent by the attorneys on the Motion Re General Election and the sanctions motion, specifically stating "total attorney[ ] fees incurred" for each. The declaration further stated "[Wilshire Commercial] would incur additional attorney[ ] fees in replying to any Opposition to [Wilshire Commercial's] Motion for Sanctions and for preparing for and appearing for the hearing on this matter." That is the evidence the Association contends was lacking.

DISPOSITION

The sanctions order is affirmed. Wilshire Commercial shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

I concur:

RUBIN, P. J.

MOOR, J., Dissenting.

I would reverse the sanctions order because the Association was deprived of the statutorily mandated safe-harbor period before sanctions were imposed. Despite the fact that *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306 (*San Diegans*)—the only case authority at the time Wilshire Commercial sought, and the Referee ordered sanctions—held that Code of Civil Procedure section 128.5 did not incorporate the safe harbor provision in Code of Civil Procedure section 128.7, subsequent authorities hold section 128.5 always mandated a safe-harbor period. (*Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117; *CPF Vaseo Associates, LLC v. Gray* (2018) 29 Cal.App.5th 997.) I disagree that the Association should be found to have forfeited this issue because of its failure to object at the time the sanctions were litigated before the Referee. Given that *San Diegans* was the only case authority available to the Association at the time, and given that the issue before us on appeal presents a pure question of law applied to undisputed facts (i.e., it is undisputed that Wilshire Commercial did not first serve its sanctions motion and wait 21 days before filing), waiver should not apply. (*CPF Vaseo Associates v. Gray*, *supra*, 29 Cal.App.5th at p. 1005; *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699–700.)

MOOR, J.